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SUBJECT: COMMERCE UPDATES ON INVESTIGATION INTO NOMINEES

REFTEL: BANGKOK 5424

1. On September 7, Embassy Economic and Commercial Counselors met with Mr. Yanyong Phuangrach, the Commerce Ministry's Deputy Permanent Secretary for Internal Trade, to be briefed on that Ministry's ongoing investigation into the sale of telecom operator ShinCorp to Singapore's Temasek (reftel). Central to this investigation is the question of whether the structure of the transaction, specifically whether the putatively Thai holding companies which are used to make the transaction compliant with Thai law are in fact Thai and not simply stand-ins, or "nominees", for the Singaporeans.

2. Yanyong disclosed that he had intervened in the investigation just prior to the release of a Commerce report which concluded that a key nominee (Kularb Kaew) in the transaction was indeed Singaporean, not Thai. He said, "I took charge of this because if we just turned the report over to the police, it would have caused big problems with other foreign investments in Thailand. The main problem is that the investigation seeks to determine if Kularb Kaew is a nominee without first defining what a nominee is. We first need a clear definition of nominee in the law."

3. Yanyong said that he and his staff are working on such a definition: "We know public expectations are high on this and everyone wants to see results as soon as possible, but we need adequate time. We also need to take into account this law's relationship with other Thai laws on land ownership and investment and to see clearly the impact of any change." Yanyong refused to be drawn out on when he expected to finish his investigation into the ShinCorp deal's nominee structure, but we were left with the impression that Yanyong's project to define the term "nominee" will take at least several months.

4. Yanyong added that his ministry wanted to hear the views of foreign investors and their governments: "We want to know what you want to see." We replied that, in our view, no one was well served by the current policy of nominee structures: the current policy lacks transparency for foreign investors, leaving many in a legally grey area; it has also been patently ineffective in preventing foreign participation in supposedly Thai-only investment areas. It might be possible, we said, to take the lemons from the Shin investigation and make lemonade by leveraging the current controversy into support for liberalized, transparent foreign investment rules, with a much smaller number of Thai-only areas where genuine national security or other vital issues exist. At Yanyong's urging, we agreed to advise the American Chamber of Commerce in Thailand to weigh in directly with Commerce on the changes U.S. investors would like to see in Thai investment rules.

Joint Chambers enter the fray

¶5. The Joint Foreign Chambers of Commerce (JFCC) independently sought clarification of the new provisions for foreign business registrants. In a bid to blunt the practice of using nominees, the Ministry of Commerce requires applications for business licenses with more than 40 percent foreign share to disclose certain information related to the source of funds used to capitalize the company. Ministry of Commerce officials assured JFCC chair Peter van Haren that the new provisions would target only new business applicants, not companies that are restructuring or renewing their license, and that the scrutiny of funds would not be retroactive.

¶6. The Ministry of Commerce further clarified that they would scrutinize the validity and source of funds of Thai shareholders only, and not foreign shares. This is in fact the crux of the investigation into Shin Corporation. Investment analysts pointed out to us that the issue is not whether Temasek exceeded maximum ownership limits in its purchase of Shin, but rather whether the Thai partners in the deal violated provisions restricting Thai nationals from holding shares for foreign entities in order to circumvent those limits.

¶7. Comment: The interests of U.S. investors diverge from those of other foreign investors, and the American Chamber of Commerce is distancing itself somewhat from statements made by the JFCC. Most U.S. companies invested under Treaty of Amity rules or Board of Investment promotions that offer national treatment and majority foreign ownership, and rarely made use of nominees. Scrutiny into current and planned investments is of much less concern to most U.S. investors, with the possible exception of companies who may have used nominee structures to (perhaps illegally) purchase land. Since we encourage adherence to Thai law, we do not plan to protest examination into possibly illegal land purchases or other dodgy

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ownership structures. However, we will continue to encourage a reassessment of foreign ownership limits and the sectors to which they should be applied. If a reassessment with the right terms of reference does occur, some good may yet result from the otherwise sad ShinCorp affair. End Comment.
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